

May 2008 / Special Alert

A legal update from Dechert's Labor and Employment and Employee Benefits and Executive Compensation Groups

## President Bush Signs the New Genetic Information Nondiscrimination Act into Law

President Bush signed into law the Genetic Information Nondiscrimination Act ("GINA" or "the Act"), H.R. 493, on May 21, 2008. The employment provisions of GINA become effective eighteen months after the date of enactment, while the provisions targeted at insurers go into effect for plan years beginning one year after the date of enactment. According to the National Human Genome Research Institute, forty-one states have enacted laws banning genetic discrimination by insurance companies, and thirty-two states have laws barring genetic discrimination in the workplace, including California, Connecticut, Delaware, Maryland, New Jersey, and New York. However, GINA is the federal government's first legislative effort in the area. Employers should be aware of three key provisions in the new law.

First, GINA makes it unlawful for employers with fifteen or more employees to refuse to hire, to discharge, or to otherwise discriminate against an employee (including applicants) with respect to compensation, terms, conditions, or privileges of employment because of that employee's genetic information. GINA further prohibits the segregation or classification of employees because of their genetic information in any way that would deprive those employees of employment opportunities or otherwise adversely affect their status as employees. Like Title VII, GINA also includes an anti-retaliation provision prohibiting discrimination because an individual has exercised his or her rights under the Act. In addition to employers, GINA also prohibits discrimination based on genetic information by employment agencies, labor organizations, and training programs. Employees asserting a claim of discrimination under GINA

must take the same steps as are required under Title VII. They must first file a charge with the EEOC and receive a right-to-sue letter before bringing suit in court.

Second, in addition to prohibiting discrimination and retaliation, GINA includes a provision making it unlawful for employers to request, require, or purchase genetic information about an employee. There are a number of exceptions to this prohibition including one for inadvertent requests for genetic information. Another exception makes it permissible to request genetic information under certain conditions where the information involved will be used for genetic monitoring of the effects of toxic substances in the workplace.

Third, GINA amends the Employment Retirement Income Security Act of 1974 ("ERISA"), the Public Health Service Act, and the Internal Revenue Code. GINA amends these statutes by prohibiting discrimination in group premiums based on genetic information and by limiting the ability of group health plans and health insurance issuers to request or require an individual or family member to undergo genetic testing. In addition, GINA amends the Social Security Act to prohibit Medicare supplemental policy issuers from denying, conditioning issuance of the policy on, or discriminating in the pricing of the policy on the basis of an individual's genetic information.

While often tracking the language of Title VII and other statutes, the language of GINA raises a number of questions for employers. For example, while employers may not, unless an exception applies, request "genetic information"

concerning their employees, that term is defined to include information about (1) an individual's genetic tests, (2) the genetic tests of family members of an individual, and (3) the manifestation of a disease or disorder in family members of an individual. The third category may raise issues for employers when processing leave and accommodation requests. While GINA includes an exemption for employers who request family medical history information under the Family and Medical Leave Act ("FMLA"), an employer's request for family medical information related to other types of leave or in relation to an accommodation request under the Americans with Disabilities Act ("ADA") may not be exempted. Hopefully the regulations that will be promulgated by the EEOC, the Department of Labor, and the Secretary of Health and Human Services will clarify this and other questions raised by GINA.

In terms of a practical response to GINA, employers need to make adjustments to their policies and practices. Employers should take precautions to insure that they do not inadvertently request or receive genetic information about their employees. For example,

employers may want to revise medical request forms to specify that they are requesting only non-genetic information. In addition, as with other discrimination laws, employers should take steps to insure that their managers and supervisors are not making employment-related decisions based on genetic information. Employers should amend their policies to reference GINA, alert staff to its requirements, and review their obligations under state laws in this area. This is particularly important because GINA does not preempt other state and federal statutes that may provide equal or greater protection for individuals in the area of genetic information discrimination. The regulations that will be promulgated by the EEOC and other federal agencies should be of assistance in determining additional ways in which employers must modify their behavior to be compliant with GINA. We will provide an update on GINA when the regulations are issued.



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## Practice group contacts

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